STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 37-81:

FORSYTH EDUCATION ASSOCIATION, MEA, NEA,

Complainant,

- vs -

ROSEBUD COUNTY SCHOOL DISTRICT NO. 14, FORSYTH, MONTANA,

Defendant,

- and -

MONTANA UNIVERSITY SYSTEM, and the LABOR RELATIONS BUREAU, DEPARTMENT OF ADMINISTRATION,

Amici Curiae.

FINAL ORDER

* *

PROCEDURAL BACKGROUND

On May 17, 1982, hearing examiner Stan Cerke issued Findings of Fact, Conclusions of Law and Recommended Order in this case. Exceptions to the hearing examiner's decision were filed by the Complainants. After reviewing the record and considering the briefs and oral argument of the parties, the Board of Personnel Appeals issued an Order dated September 27, 1982. That Order adopted the Findings of Fact of the hearing examiner but concluded that the employer's conduct did violate 39-31-401(5), MCA. The Board then remanded the case to the hearing examiner to fashion an appropriate remedy for such a violation. On January 18, 1983, the hearing examiner issued an Amended Recommended Order which stated an administratively noticed fact and stated a recommended remedial order. The administratively noticed fact was that the parties involved in this ULP proceeding had reached agreement on a subsequent collective bargaining agreement and agreed that retroactive pay had been paid. Monetary relief therefore was not considered as a possible remedy. The recommended

remedial order ordered the defendant school district to, "cease not paying the increments provided for in a collective bargaining agreement upon the expiration of that agreement." The hearing examiner stated that, "Such action, short of impasse, constitutes unilateral changes in working conditions and a violation of Section 39-31-401(5) MCA."

The defendant school district filed timely exceptions to the Amended Recommended Order and later filed a motion requesting the Board to reconsider its earlier decision that defendant's conduct constituted a violation of the Act.

The complainant education association filed a Motion to Dismiss [Defendant's] Motion for Reconsideration on procedural grounds. The Board denied the Motion to Dismiss.

Thereafter, the Montana University System and the Labor Relations Bureau, Personnel Division of the Department of Administration both petitioned the Board to be named amicus curiae. Through an Order issued April 1, 1983, the Board granted the petitions to be named amicus curiae.

Subsequently, the education association, the school district, and the University System-Department of Administration filed briefs in support of their respective positions.

At its June 3, 1983 meeting, the Board granted the school district's motion for reconsideration and then heard oral argument from the school district, the Montana University System and the education association. The Board voted to postpone a decision on the matter. At its September 23, 1983 meeting, all Board memebers were present and engaged in a lengthy discussion of the issue involved. The Board voted 5-0 to affirm the hearing examiner's order dated January 18, 1983.

THE ISSUE

The issue before us of course is:

WHETHER FAILURE OF A SCHOOL DISTRICT TO PAY EXPERIENCE AND ADDITIONAL EDUCATIONAL AND CREDIT INCREMENTS PROVIDED IN AN EXPIRED COLLECTIVE BARGAINING AGREEMENT, WHILE THE PARTIES ARE NEGOTIATING FOR A SUCCESSOR AGREEMENT, IS A UNILATERAL CHANGE IN WAGES CONSTITUTING A REFUSAL TO BARGAIN IN GOOD FAITH IN VIOLATION OF SECTION 39-31-401(5), MCA.

USE OF NLRB PRECEDENT OR PUBLIC SECTOR PRECEDENT FROM OTHER STATES.

The school district cites us cases from the public sector (primarily New York) in support of its position. The amici curiae cite private sector federal precedent which they assert supports their position.

We discuss the federal private sector law we believe applicable, in the next section of this Final Order.

We specifically reject, however, the use of public sector cases as precedent in this case for the reasons stated below.

Of foremost importance to us is the fact that Montana's Public Employee Collective Bargaining Act, 39-31-101, et. seq., which is the statutory basis for this proceeding is modeled almost identically after the federal Act, the Labor-Management Relations Act, 29 USC 150, et. seq. For this reason and other cogent reasons, the Montana Supreme Court, when called upon to interpret the Collective Bargaining for Public Employees Act, 39-31-101 through 39-31-409, MCA, has consistently turned to National Labor Relations Board (NLRB) precedent for guidance. State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974); AFSCME Local 2390 v. City of Billings, _____Mont._____, 555 P.2d 507, 93 LRRM 2753 (1976); The State of Montana, ex rel.,

The Board of Personnel Appeals v. The District Court of the Eleventh Judicial District, _____Mont._____, 598 P.2d 1117, 36 St. Rpt. 1631 (1979). Teamsters Local #45 v. Board of Personnel Appeals and Stuart Thomas McCarval, _____Mont._____, 635 P 2d 1310, 38 St. Rep. 1841 (1981).

On the other hand, the public sector collective bargaining acts of other states are not always similar to Montana's Act. One very significant difference is that Montana law permits strikes by public employees (which is analogous to the LMRA for private sector employees) and almost all other states have restrictions on public sector strikes.

The need to take that factor alone into consideration in interpreting Montana's Act, renders resort to the federal NLRB precedent ineluctable.

Second, the LMRA represents broad national trends in labor relations law, not the result of political decision making in one state which might have no bearing on Montana's Act. As recognized by the Montana Supreme Court, the extensive use by the Montana legislature of wording from the LMRA necessarily reflects legislative intent. That intent is judicially acknowledged by the judicial doctrine that similar wording in similar Acts are to be construed similarly. This Board believes that the wording of Montana's Act, reflects a legislative intent to follow those broad national trends.

Third, the members of the Board of Personnel Appeals believe that the NLRB and the federal courts reviewing the NLRB constitute a better area of law to draw precedent from because of the federal sector's (a) greater experience (since 1936); (b) greater number of cases (the LMRA is national of course); and (c) greater consistency, to the extent possible with the continuing development of labor law, as in all areas of law.

And fourth, the two-fold problem of the use of another state's precedent. There first is the problem that the use of another state's precedent in one case becomes precedent in itself to continue using that other state's precedent for other labor matters. For example, to adopt New Jersey law on this case we would thereby set a precedent to adopt other New Jersey case law on other issues. That would impose a substantial limitation on the amount of experience we could otherwise draw from the federal sector.

There secondly is the problem of which state do we follow. Consider the following: The following states have thus far adopted the position of the school board in this case:

MAINE: - M.S.A.D. No. 43 Teachers' Assoc. v. M.S.A.D. No. 43 Board of Directors, _____Me._____, 432 A.2d 395 (1981).

NEW YORK: - Board of Cooperative Educational Services of Rockland County v. New York State Pulbic Employment Relations Board, et. al., 41 N.Y. 2d 753, 395 N.Y.S. 2d 439, 363 NY. 2d 1174, 95 LRRM 3046; Corbin v. County of Suffolk, 54 A.2d 698, 387 NYS 2d 295, 95 LRRM 2030 (NY App Div. 1976); Wyandanch Union Free School District, Board of Education v. Wyandanch Teachers Association, 58 A.2d 415, 396 N.Y.S. 2d 702, 96 LRRM 2652 (NY App. Div. 1977).

WISCONSIN: - Menasha Teachers Union, Local 1166, WFT-AFT, AFL-CIO vs. Menasha Joint School District, National Public Employment Reporter (NPER) Volume 4, page V-676, an administrative decision by the Wisconsin Employment Relations Commission.

An Indiana case cited by the school district (at page 12 of its May 27, 1983 brief) which was an administrative decision by the Indiana Education Employment Relations

Board, was overruled by the Superior Court of Indiana in December 13, 1980. See infra.

The following states have thus far adopted a position which supports the education association in this case:

CALIFORNIA: - Davis Unified School District, 2 NPER, page V-480 (1980), decision of the California Public Employment Relations Board.

FLORIDA: - Duval County School Board, 2 NPER page V-480 (1980) a decision of the Florida PERC. Review of this decision was dismissed for lack of jurisdiction.

INDIANA: - Mill Creek Community School Corporation, 3 NPER p. 336-337 (1980), a decision by the Superior Court of Indiana.

PENNSYLVANIA: - Chester Upland School District, 2 NPER p. V 401 (1980), a decision by the Court of Common Pleas; and Lehigh County, 2 NPER p. V-480 (1980), an administrative decision by the Pennsylvania PLRB.

It is thus seen that the states themselves are at odds over the issue before us in this case.

NLRB PRECEDENT ON THE ISSUE BEFORE US:

We begin our analysis of the private sector precedent with the statements that are settled law. A unilateral change in a mandatory subject of bargaining, even after the expiration of a collective bargaining agreement, is a violation of Section 8 (a)(5), of the Labor Management Relations Act [LMRA], 29 U.S.C. 158 (a)(5), the equivalent of section 39-31-401 (5), MCA. Wages, however stated or paid are a mandatory subject of bargaining. Therefore, a unilateral change in wages, even following expiration of a collective bargaining agreement, is a violation of 39-31-401 (5), MCA.

Clear examples of these established rules are found in the facts and holdings of the following cases.

Although we have earlier rejected the use of precedent from other states involving other public sector statutes, in order to understand the legal context this issue involves, we find it helpful to refer to the case of Galloway Board of Education vs. Galloway Education Association, (N.J. Sup. Ct.), 395 A. 2d 218, 100 LRRM 2250 (1978). We refer to the Galloway case not for its holding but for its discussion of the federal sector precedent interpreting the LMRA, 29 USC 150, et. seq.

In Galloway, the New Jersey Supreme Court stated that,

> A settled principle of private sector labor law under the LMRA is that an employer's unilateral alteration of the prevailing terms and conditions of employment during the course of collective bargaining concerning the affected conditions constitutes an unlawful refusal to bargain, since such unilateral action is a circumvention of the statutory duty to bargain. NLRB v. Katz, 369 U.S. 736, 743-47, 82 S.Ct. 1107, 8 L.Ed. 2d 230, 50 LRRM 2177 (1962); NLRB v. J.P. Stevens & Co., Inc., Gulistan Div., 538 F.2d 1152, 1162, 93 LRRM 2265 (5 Cir. 1976). "Unilateral" in this regard refers to a change in the employment conditions implemented without prior negotiation to impasse with the employee representative concerning the issue. The basis of the rule prohibiting unilateral changes by an employer during negotiations is the recognition of the importance of maintaining the then-prevailing terms and conditions of employment during this delicate period until new terms and conditions are arrived at by agreement. Unilateral changes disruptive of this status quo are unlawful because they frustrate the "statutory objective of establishing working conditions through bargaining." NLRB v. Katz, supra, 369 U.S. at 744, 82 S.Ct. at 1112.
>
> Galloway, supra, 100 LRRM at 2258

> We must accordingly determine whether payment of the salary increment withheld by the Board constituted an element of the status quo whose continuance could not be disrupted by unilateral action. The answer to this question turns, to some extent, on whether the annual step increments in the teachers' salaries were "automatic," in which case their expected receipt would be considered as part of the status quo, or "discretionary," in which case the grant or denial of the salary increases would be a matter to be resolved in negotiations. Analytically helpful in this inquiry is stating the issue in an alternative manner - could the Board have been found to have violated the Act if it had granted, rather than withheld, the salary increments. Under the rationale of Katz, supra, the answer to the question is in the affirmative if the increments were discretionary and in the negative if they were automatic. See 369

U.S. at 746-7, 82 S.Ct. 1107. In Katz, the Supreme Court,

> ...distinguished between automatic and discretionary wage increases and held that discretionary increases during contract negotiations violated the employer's duty to bargain in good faith. Automatic increases are sanctioned because they do not represent actual changes in conditions of employment but continue the status quo in the sense that they perpetuate existing terms and conditions of employment. Because the employees expect these benefits and readily recognize them as established practice. The increases do not tend to subvert employee's support for their bargaining agent or disrupt the bargaining relationship. (NLRB v. John Zink Co., 551 F.2d 799, 801, 94 LRRM 3067 (10 Cir. 1977).

Galloway, supra,
100 LRRM at 2259

In a Fifth Circuit case involving an employer's refusal to continue contributions to a health, welfare and pension fund for carpenters pursuant to an expired collective bargaining agreement (also cba), the Court of Appeals stated that,

> At contract expiration, an employer may not unilaterally alter, without bargaining to impasse, a contractual term that is a mandatory subject of bargaining. This result obtains because such a term by operation of statute continues even after the contract embodying it has terminated. See Nolde Brothers, Inc. v. Local 358, Bakers & Confectionery Workers Union, 430 U.S. 243, 257, 97 S.Ct. 1067, 1075, 51 L.Ed.2d 300 (1977) (dissenting opinion); SAC Construction Co., supra, 603 F2d at 1156-57; Cartwright Hardware Co. vs. NLRB, 600 F.2d 268, 269-70 (10th Cir. 1979); NLRB v. Cone Mills Corp., 373 F.2d 595, 598-99 (4th Cir. 1967); Industrial Union of Marine and Shipbuilding Workers v. NLRB, 320 F2d 615, 619-20 (3d Cir. 1963), cert. denied, 375 U.S. 984, 84 S.Ct. 516, 11 L. Ed.2d 472 (1964). Examples of contractual terms which survive contract expiration include a schedule of wages and fringe benefits, see Cartwright Hardware Co., supra, 600, F.2d at 269-70, superseniority rights of a shop steward, see Cone Mills Corp., supra, 373 F.2d 598-99, employee seniority rights, See Industrial Union of Marine & Shipbuilding Workers Union, supra, 320 F.2d 619-20, and grievance procedures. See id. Since the carpenters' benefits are contractual terms that continue by operation of the Act, respondent would not have been free to cancel those benefits, even though the contract expired, without first bargaining to an impasse. Thus, the Board's remedy was a precise method of restoring the status quo ante.

NLRB v. Haberman Construction Company,
618 F.2d 288 at 302-303 (CA 5, 1980)

In the case of American Distributing Co. v. NLRB, 715 F.2d

446, 114 LRRM 2402 (CA 9, 1983), the Ninth Circuit addressed the issue of an employer's obligation to continue making contributions to a pension trust fund after the expiration of a cba. The Ninth Circuit began its discussion by stating the applicable law.

> An employer may not unilaterally institute changes in established terms and conditions of employment that constitute mandatory subjects of bargaining. 29 U.S.C. Section 158(a)(5), (d); see Fibreboard Paper Products Corp. v. NLRB, 379 US 203, 209-10, 57 LRRM 2609 (1964). The prohibition against unilateral changes extends past the expiration of a collective bargaining agreement until the parties negotiate a new agreement or bargaining in good faith to impasse. NLRB v. Carilli, 648 F2d 1206, 1214, 107 LRRM 2961 (9th Cir. 1981). Because contributions to an employee pension trust fund constitute a mandatory bargaining subject, an employer may not make unilateral changes in pension fund contributions. Id. at 1213-14. An employer who does make such unilateral changes has committed an unfair labor practice in violation of sections 8(a)(1) and (5) of the Act.
>
> American Distributing Co., supra, 114 LRRM at 2404

The Court went on to state that, "The Company does not dispute that it discontinued the pension trust fund contributions upon the expiration of the 1977-80 contract. Instead, the company claims..." three defenses. One of the asserted defenses was that under Section 302 of the Labor Management Relations Act (LMRA), the pension trust fund could not legally accept and the company could not legally make further contributions. Under section 302 of the LMRA an employer may make payments to a pension fund and the trust may accept them only if "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." 29 U.S.C. Section 186(c)(5)(B).

The company's argument was that since statute mandates the existance of a written agreement conforming to certain requirements before an employer can make contributions, and since the cba expired, it was therefore illegal to make contributions.

Affirming the concept that an expired cba is still a living document which retains binding obligations, the Ninth Circuit stated and held as follows:

> The Board properly found that the Company had an obligation to continue the pension contributions absent a bargaining impasse or a waiver from the Union. Because a written agreement -the expired contract - specified the basis on which the Company was legally obligated to make contributions, the literal language and underlying purpose of section 302 has been satisfied. See Producers Dairy Delivery Co. v. Western Conference of Teamsers Pension Trust Fund, 654 F.2d 625, 627, 108 LRRM 2510 (9th Cir. 1981); Peerless Roofing Co. v. NLRB, 641 F2d 734, 736, 107 LRRM 2330 (9th Cir. 1981).
>
> The Company asserts that this case is distinguishable from Producers and Peerless because here both the collective bargaining agreement and the pension trust certification have expired. In Peerless, the trust fund agreement was still valid. 641 F2d. at 736. Nonetheless, the unequivical language of Producers states that an employer is required to maintain the status quo and make payments in conformity with the terms of an expired written agreement. 654 F.2d at 627. Accordingly, we held that the Company's section 302 defense fails.
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> American Distributing Co., supra, 114 LRRM at 2406.

In full accord with the American Distributing Co. holding, supra, is another decision issued by the 9th Circuit on the same day. See Stone Boat Yard v. NLRB, 715 F2d, 441, 114 LRRM 2407 (CA 9, 1983).

We therefore see that an expired cba is recognized by the 9th Circuit Court of Appeals as a fully binding document which can lawfully serve as the statutorily mandated, legally binding written agreement controlling the receipt of funds into a pension fund.

In the case of Clear Pine Mouldings, Inc. v. NLRB 632 F.2d 721 at 729-730 (CA 9, 1980), the Ninth Circuit held that health care plans are mandatory subjects of bargaining and that an employer's unilateral change in health care plans after the expiration of the cba was a violation of 8 (a)(5) of the LMRA.

Additionally, another type of case involving a unilateral

change by an employer in the organizational phase of collective bargaining, when of course there is no cba, nor even an expired cba, is instructional on the issue before us.

In the case of NLRB v. Southern Coach and Body Company, Inc. 336 F2d 214 (CA 5, 1964), the Court of Appeals was confronted with the legality of an employer granting unilateral wage increases to some of its employees while the union was attempting to persuade a majority of employees to join the union. The employer contended that it had a long standing practice of granting automatic wage increases three and six months after initial hiring and that this automatic increase based on experience thus did not violate 8(a)(5) of the LMRA. The Fifth Circuit agreed with the employer and held as follows:

> The rule is clearly established that the granting of a unilateral wage increase, in the absence of some extenuating circumstance such as the existence of a bona fide bargaining impasse or the implementation of a new wage program identical to one previously offered to and rejected by the bargaining agent, constitutes a refusal to bargain in good faith because it serves to disparage the union and frustrate its bargaining objectives. See N.L.R.B. v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 2d 230 (1962); N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320 (1948). However, the Supreme Court clearly indicated in both the Crompton-Highland and Katz cases that a mere continuation of the status quo during the bargaining period cannot constitute a disparagement of the bargaining process; there must be an actual change in working conditions. Therefore, as to the three-month and six-month automatic increases, there is no evidence on which to base a conclusion that section 8 (a) (5) was violated.
>
> NLRB v. Southern Coach and Body, 336 F.2d at 217.

Southern Coach and Body is helpful in analyzing the case sub judice from another point of view.

As the Supreme Court of the state of New Jersey (in Galloway, supra) found helpful, analyzing the case sub judice from the standpoint of whether the school board would have been guilty of an unfair labor practice if it had given

the step increments, we find that Southern Coach and Body, supra, holds that granting automatic wage increases is not a ULP. See also NLRB v. Katz, 369 US 736 at 746-47, 82 S.Ct. 1107 (1962).

Thus the Forsyth School District would not have been guilty of an unfair labor practice if it had paid automatic step increments, even pursuant to an expired collective bargaining agreement (cba).

The case of Nolde Bros, Inc. v. Local No. 358 Bakery and Confectionary Workers Union, 430 U.S. 243, 97 S.Ct. 1067 (1977), rehearing denied, 430 U.S. 988, 97 S.Ct. 1689, holds that a grievance which arises after the expiration of a cba must be arbitrated pursuant to the grievance mechanism established in the expired cba. In Nolde Bros., during negotiations after the contract's expiration date, the union gave notice of cancellation and the contract terminated a week later. After further negotiations produced no results, the employer announced that it was closing its plant immediately. The employer paid accrued wages, but rejected the union's demand for severance pay under the cba and declined to arbitrate the claim therefor on the ground that its obligation to do so terminated with the cba.

The union brought suit before a federal district court to compel the employer, inter alia, to arbitrate the severance-pay issue. On appeal the U.S. Supreme Court held that,

> In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.
> We therefore agree with the conclusion of the Court of Appeals that, on this record, the Union's claim for severance pay under the expired collective bargaining agreement is subject to resolution under the arbitration provisions of that contract.
>
> Nolde Bros., supra, 97 S.Ct. at 1074

The Board believes that the proper implementation of

the status quo ante in a situation involving an expired cba which contains a pay matrix is to pay according to the schedule set forth for determining wages. If a teacher who last year had 8 years of experience but now has 9 full years of experience, then that teacher's proper placement on the wage scale - pay matrix is to place him/her at 9 years experience and whatever educational credits he now has.

By way of example, craft contracts that provide wages for apprentices often state that an apprentice shall be paid, say $3.00 per hr. for the first six months or 1040 hrs., then $3.50 per hr. for the next 1040 hrs., then $4.00 per hr. etc. This goes on until the apprentice satisfies his 3-4 year apprenticeship and thereafter is paid equal to the journeyman hourly wage rate for that craft. Such clauses reflect the fact that additional experience (time at the job) and additional learning (an apprentice often is required to fulfill approximately 150 hours of classroom work per year during his apprentice), is valuable to the employer and the employer contracts to pay the step increments.

In that example, if the following facts occurred; (1) the contract expired, (2) the employees continued to work, and (3) an apprentice became eligible for a step increase because he had satisfied the requisite number of hours under the expired cba, then it is clear that the employer would be obligated to pay the additional step increment even after the cba expired.

This Board believes the apprenticeship analogy is instructive for the case sub judice.

Two cases from the NLRB which are closely analagous to the fact situation of the case before us are: Struthers Wells Corp. 262 NLRB No. 136, 111 LRRM 1018 (1982); and Meilman Food Industries, Inc., 234 NLRB 696, 97 LRRM 1372

(1978). In Struthers Wells, supra, a collective bargaining agreement, hereinafter cba, expired November 1, 1980. The union engaged in a two day strike in early November but thereafter continued to work. The expired cba had a cost-of-living adjustment provision (COLA) in it relating to wages which stated that on January 1 of each year, wages would be adjusted pursuant to the Consumer Price Index as of the preceding November 15.

In Struthers Wells, the NLRB held that,

> Indeed, to so find would go against Board precedent concerning employer obligations after expiration of a collective bargaining agreement.[5]
>
> Here the cost-of-living adjustment was an existing term and condition of employment as established by the recently expired collective-bargaining agreement. It is axiomatic that such a condition of employment survives the expiration of a collective-bargaining agreement and cannot be altered without bargaining.[6] An employer is permitted to institute a unilateral change either where the union has waived bargaining on the issue or where the unilateral change is a result of a rejected company offer after impasse has been reached.[7] Otherwise, the employer has a duty to continue the terms of the expired collective-bargaining agreement.

5. See, e.g., Bethlehem Steel Company (Shipbuilding Division), 136 NLRB 1500, 50 LRRM 1013 (1962)

6. Cf. Harold W. Hinson, d/b/a a Hen House Market No. 3, 175 NLRB 596, 71 LRRM 1072 (1969), enfd. 428 F.2d 133, 73 LRRM 2667 (8th Cir. 1970).

7. Peerless Roofing Co. Ltd., 247 NLRB 500, 103 LRRM 1173 (1980); Allen W. Bird II. Receiver for Caravelle Boat Company, a Corporation, and Caravelle Boat Company, 227 NLRB 1355, 95 LRRM 1003 (1977); and Royal Himmel Distilling Company, 203 NLRB 370, 83 LRRM 1219 (1973).

Struther Wells,, supra, 111 LRRM at 1019-1020.

The NLRB found that neither exception (bargaining waiver or impasse) was extant in that case and held that,

> From these facts alone it is evident that Respondent was obligated to continue to implement the COLA as required by the expired agreement. Thus, we find that its failure to do so violated Section 8(a)(5) and (1) of the Act.

Struther Wells, supra 111 LRRM at 1020

The school board and the amici curiae contend that Struther Wells is inapposite for the reason that "a tentative

agreement had been reached " in that case. While the facts of that case state that that was the position of the union,[1] a complete reading of the Board's analysis shows that the possible existance of a tentative agreement was only secondarily mentioned in the NLRB's analysis.

The board found Struther Wells guilty of two separate violations of 8 (a)(5). The first violation was for the unilateral change in wages by refusing to pay the COLA increment pursuant to the expired cba. The second violation was premised on the employer's stated reason for not paying the increment --in order to gain leverage at the bargaining table. The NLRB found this to be a separate violation.

In its analysis of the first violation, the NLRB examined the facts to determine the applicability of the two exceptions to the general rule against unilateral changes. See 111 LRRM 1019-1020, quoted supra. As stated earlier, the NLRB found neither exception factually supported and on those facts alone found a ULP.

The case of Meilman Food Industries, Inc., supra, involved facts essentially similar to the facts in Struther Wells, supra, except that the cba expired on December 6, after the CPI determination date of November 15. In Meilman, the NLRB found that the employer's refusal to effectuate the increase on January 1 was a unilateral change in the existing wage structure in violation of 8 (a)(5) of the Act.

CONCLUSION

Maintenance of the status quo means adherence to the expired collective bargaining agreement (cba). If the expired cba contains a wage scale (pay matrix) based on (a) the

1. When the employer announced in December its intention not to implement the COLA on the following January 1, the union responded that it was the union's position that a tentative agreement had been reached on that issue.

number of years of teaching experience and (b) the degrees (B.A., M.A.) and the number of 15-credit increments that a given teacher has, then adherence to the expired cba means that a teacher must be given the salary reflected by his years of experience and number of post- B.A. college credits at the start of each year. That means that a teacher who has gained an additional year of experience (and any additional, approved credit increments) must be given credit on the wage scale for that additional year's experience (and 15 credit increments). That is simply adhering to the expired cba as required by the Act and federal precedent interpreting the federal Act, (the LMRA).

The school board argues that to pay the increment changes the status quo (page 14 of its May 27, 1983 brief). We disagree.

The expired cba contains a pay matrix specifying annual increments for each additional year of service. That pay matrix constitutes wages and is therefore a mandatory subject of bargaining. Teachers who begin a new school year and who have met the contractual requirements (of an additional year's teaching experience and/or additional 15-credit increments) are entitled to be paid the salary according to their experience and/or education. To not pay a teacher according to the contract's stated method of placement on the pay matrix and in accord with the truth as to how many years experience and college credits that a given teacher actually has, is a unilateral change in a mandatory subject of bargaining.

Placement on a salary schedule such as the pay matrix in question is an automatic wage increase determined only by length of years of experience and current number of credits. To pay an automatic wage increment is not an unfair labor

practice (ULP). Southern Coach and Body, supra. To not pay an automatic wage increase, such as a COLA, is a ULP. Struthers Wells, supra.

By paying the teachers during the beginning of the 1981-1982 school year, the same salaries they received during the previous year (the 1980-1981 school year), the Forsyth School District was not compensating the teachers according to the salary schedule then in effect, i.e., under the terms of the still binding, expired, 1980-1981 CBA.

Since the payment of the salary increments herein should have been automatic upon the start of the 1981-1982 school year, the school district's unilateral withholding of the increments violated 39-31-401 (1) and (5), MCA.

We therefore hold that the Forsyth school district's failure to pay returning teachers in the fall of 1981 the automatic step increase to which they were entitled was a violation of 39-31-401 (1) and (5), MCA.

This decision by the BFA is not as onerous as suggested by the school district and amici curiae. That is so for the reason that if during negotiations impasse occurs, then the employer is free to unilaterally implement its last, best, final offer.

We note that the 1983 legislature of Montana saw the introduction of two bills which would have directly affected the issues before us in this case. S.B. 198, introduced by Senator Tveit at the request of the Montana School Board Association (MSBA) would have mandated that a school district not pay additional automatic step increments upon the expiration

of a cba. S.B. 199, also introduced by Senator Tveit at the request of the MSBA would have ordered the Board of Personnel Appeals to follow only public sector precedent in interpreting Montana's Public Employees Collective Bargaining Act, 39-31-101 et. seq.

Both bills died in the Senate Labor Committee.

For the reasons stated above, it is ordered that:

(1) The exceptions of the Forsyth School District are herehy denied;

(2) The hearing examiner's Amended Recommended Order is affirmed; and

(3) The Forsyth School District violated 39-31-401 (1) and (5), MCA when it unilaterally changed the implementation of the wage scale contained in an expired collective bargaining agreement.

(4) The Forsyth School District shall cease and desist not paying automatic step increments upon the expiration of a collective bargaining agreement.

Dated this 14th day of December, 1983.

Board of Personnel Appeals

By: Allan L. Joscelyn
Allan L. Joscelyn
Chairman

CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 20th day of December, 1983, postage paid and addressed as follows:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 37-81:

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Complainant,

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Defendant.

AMENDED RECOMMENDED ORDER

* *

By ORDER dated September 27, 1982, the Board of Personnel Appeals adopted the hearing examiner's Findings of Fact in this matter. The Board did not adopt the hearing examiner's Conclusion of Law or Recommended Order. The Board concluded that the Rosebud County School District No. 14, Forsyth, Montana, did violate Section 39-31-401 (5) MCA, by not paying the increments provided for in the expired collective bargaining agreement. The Board remanded the matter to the hearing examiner to establish a remedy consistent with the above Conclusion of Law.

During the oral argument before the Board it developed that the parties in this matter had reached agreement on a collective bargaining agreement and the retroactive pay pursuant to that agreement. Because the retroactive pay, at issue in this matter, had been paid, no monetary relief is possible for a remedy. Therefore;

IT IS ORDERED that the Defendant, Rosebud County School District No. 14, Forsyth, Montana, cease not paying the increments provided for in a collective bargaining agreement upon the expiration of that agreement. Such action, short of impasse, constitutes unilateral changes in working conditions

and a violation of Section 39-31-401(5) MCA.

DATED this 18 day of January, 1983.

BOARD OF PERSONNEL APPEALS

By _____
Stan Cerke
Hearing Examiner

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 18th day of January, 1983:

Emilie Loring
HILLEY & LORING, P.C.
Executive Plaza - Suite 2C
121 4th Street North
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Sue Rooney
Montana School Boards Association
501 North Sanders
Helena, MT 59601

_____

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS
IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 37-81:

FORSYTH EDUCATION ASSOCIATION, MEA, NEA, Complaintant, -vs- ROSEBUD COUNTY SCHOOL DISTRICT No. 14, FORSYTH, MONTANA, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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On October 13, 1981, the Complainant, in the above captioned matter, filed an unfair labor practice complaint with this Board charging the Defendant of violation of Sections 39-31-401(1) and (5) MCA. More specifically, the Complainant alleged that the Defendant, by its action of not implementing salary increment provisions of an expired collective bargaining agreement while the parties were engaged in negotiations for a successor agreement, unlawfully made unilateral changes in previously negotiated wages.

The Defendant, on October 27, 1981, filed an ANSWER to the unfair labor practice complaint with this Board denying violation of Sections 39-31-401(1) and (5) MCA.

By STIPULATION signed on December 21, 1981, the parties agreed upon the facts in this matter, defined the issue and set a briefing schedule. The last brief in this matter was received on March 23, 1982.

The Complainant, Forsyth Education Association; MEA, NEA was represented by Emilie Loring, HILLEY & LORING, P.C., Great Falls, Montana. The Defendant, Rosebud County School District No. 14, was represented by Duane Johnson and Sue Romney, Montana School Boards Association, Helena, Montana.

ISSUE

Whether failure of a school district to pay experience and additional education credit increments provided in an expired collective bargaining contract, while the parties are negotiating for a successor agreement, is a unilateral change in wages constituting a refusal to bargain in good faith, in violation of Section 39-31-401(5) MCA.

STIPULATED FACTS

1. The Forsyth Education Association, affiliated with the Montana Education Association, is the duly recognized exclusive representative for collective bargaining of the faculty employed by Defendant.

2. Defendant, Rosebud County School District No. 14, is a body corporate, political subdivision, of the State of Montana, operating the elementary and high schools in Forsyth, Montana.

3. The parties had a Professional Negotiations Agreement, Master Contract which expired on June 30, 1981.

4. There was no provision in the expired contract to extend its provisions beyond its expiration date.

5. The parties are in negotiations for a successor collective bargaining contract; agreement has not been reached.

6. The expired agreement contained a teachers' salary schedule which provided for increments based on experience and increments contingent on additional educational credits.

7. Defendant has issued individual contracts to the teachers and is making 1981-82 salary payments based on teachers' salaries for 1980-81, without any additional experience and education increments provided in the old contract.

DISCUSSION

The issue in this matter has been narrowed because of the factual situation. The Master Contract between the parties, which contained a teachers' salary schedule providing for automatic increments based upon experience (years of service) and education (additional credits), expired June 30, 1981. No provision existed to extend the contract beyond the expiration date. The parties were in negotiations for a successor contract and, although agreement had not been reached, they were not at impasse. The Defendant, Rosebud County School District No. 14, issued individual contracts in the Fall of 1981 to the teachers for the 1981-82 school year containing salaries based upon the expired Master Contract without additional automatic increments. The Complainant, Forsyth Education Association, MEA, NEA, alleged that this action of not implementing the increased salary increments constituted a unilateral change in wages in violation of Sections 39-31-401(1) and (5) MCA.

There is no dispute that, as a general rule, an employer may not unilaterally alter wages or other employment conditions that are mandatory subjects of bargaining. Such an action may constitute a refusal to bargain in good faith in violation of the Act. (See NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). The parties do not disagree that the experience and education increments are mandatory subjects of bargaining. The question in this matter simply becomes whether or not the "status quo" of the increments was unilaterally changed by the Defendant.

The Complainant cites Galloway Board of Education v. Galloway Education Association, 395 A. 2d 218 (N.J. Sup. Ct. 1978) 100 LRRM 2250 as being a case almost in point. In this New Jersey case a one-year contract containing a salary schedule for the 1974-75 school year plus annual salary

increments expired June 30, 1975. At the start of the 1975-76 school year the parties, the Galloway Township Education Association (the Association) and the Galloway Township Board of Education (the Board) were in negotiations for a successor agreement. The Association filed an unfair labor practice charge alleging the Board refused to negotiate in good faith by its action of unilaterally withholding the annual salary increment due at the beginning of 1975-76 school year. The facts of this case are nearly identical to the matter at hand. However, in New Jersey a specific state statute (N.J.S.A. 18A:29-4.1) dictates that school boards shall adopt salary schedules for two-year durations. Thus, in the Galloway case, the Board by its agreement with the 1974-75 collective bargaining contract, adopted a salary schedule that would, by state statute, extend into the 1975-76 school year. The New Jersey Supreme Court did affirm that the Board unilaterally withheld the annual salary increments which constituted a refusal to bargain in good faith. However the Court stated, "We need not consider the general issue of whether the terms and conditions of employment which prevailed under a previous collective agreement constitute the 'status quo' after its expiration because in this case a specific statute applies to command that conclusion with respect to the payment of increments according to the salary schedule."

The issue and facts in Board of Coop. Educational Servs. of Rockland County v. New York State Public Employment Relations Bd., 41 N.Y. 2d 753, 395 N.Y.S. 2d 439, 363 N.E. 2d 1174, 95 LRRM 3046 (hereafter referred to as BOCES) are similar, if not identical, to the case at hand. In BOCES, the collective bargaining agreement between the parties had expired prior to a successor agreement being adopted. The expired agreement had contained a salary schedule and provi-

sions for automatic step increments. In previous years upon expiration of the collective bargaining agreement, the public employer had paid returning unit employees the automatic step increments before a successor agreement was reached. However, on June 19, 1974, after being advised that the unit employees wished to negotiate a successor agreement to the 1972-74 contract, the public employer adopted a resolution affecting the status of salaries during the course of negotiations. The resolution provided that pending the execution of a new agreement or September 1, 1974, whichever came earlier, the provisions of the agreement expiring June 30, 1974, would be recognized, including salary and salary rates in effect on June 30, 1974. Pursuant to the resolution, which had the same effect of the individual teaching contracts in the present matter, the public employer maintained the salaries at the rate in effect on June 30, 1974, during negotiations for the successor agreement, but refused to pay the automatic step increments to returning unit members. Because of the refusal, the labor organization filed an unfair labor practice charge alleging that the public employer had unilaterally withdrawn a previously enjoyed benefit - automatic step increments.

In its reasoning of the BOCES case, the Court reviewed the principles of labor law relating to maintaining the "status quo" during negotiations. Unilateral changes to wages and conditions of employment by the employer during the course of negotiations indicates lack of good faith bargaining. The Court stated, "While such a principal may apply where an employer alters unilaterally during negotiations other terms and conditions of employment, it should not apply where the employer maintains the salaries in effect at the expiration of the contract but does not pay increments." The Court also reasoned, "To say that the

'status quo' must be maintained during negotiations is one thing; to say that the 'status quo' includes a change and means automatic increases in salary is another." The Court concluded, "We hold that, after the expiration of an employment agreement, it is not a violation of a public employer's duty to negotiate in good faith to discontinue during the negotiations for a new agreement the payment of automatic annual salary increments, however long standing the practice of paying such increments may have been."

The question addressed in Wyandanch Union Free School District, Board of Education v. Wyandanch Teachers Association, 58 AD 2d 475, 396 NYS 2d 702, 96 LRRM 2652 [NY App.Div. (1977)] is identical to the matter at hand and the BOCES, supra, case. However, the Court in WYANDANCH dealt with a factual matter that presents a curious difference to the case at hand. Unlike the fact in BOCES, supra, and the present matter that the employment agreement had expired and no provisions were made to extend the agreement through the period of negotiations, in WYANDANCH, supra, a survivorship clause was contained in the employment agreement. The clause stated:

> "ARTICLE XXII SUCCESSOR AGREEMENTS
>
> "A. On or after February 1, 1976, either party may notify the other, in writing, that negotiations are required on negotiable items for the collective bargaining agreement for the succeeding school year. The notice shall set forth the times which that party desires to negotiate. Negotiating sessions shall commence within ten days of the notice initiating negotiations.
>
> "B. In the event a successor contract or provisions are not agreed upon on or before the termination date of the present contract or provisions, all terms of the present contract and all working conditions will remain in effect until the successor contract or provisions have entered into. Upon agreement all salaries, benefits and working conditions

> will be retroactive to the termination date of the present contract or provisions."

In WYANDANCH, supra, the Court addressed this factual difference:

> While, as we have noted, the [unit members] in the [BOCES] case sought to collect salary increments after the expiration of a survivorship clause, and here the contract does have such a clause, we interpret the broad language of the Court of Appeals to void any attempt to compel the payment of increments under an expired contract even though that contract is deemed, for other purposes, to continue in effect.

The facts in CORBIN v. COUNTY OF SUFFOLK, 54 AD2d 698, 387 NYS2d 295, 95 LRRM 2030 [NY App.Div. (1976)] are on all forms with the matter at hand. The contract had expired and the parties were in negotiations for a successor collective bargaining agreement. The public employer maintained the "status quo" by honoring the terms of the expired contract except with respect to the salary increment provisions. The bargaining unit employees charged that the employer unilaterally altered salaries which constituted a refusal to bargain in good faith. The Court succinctly stated, "We disagree with [the bargaining unit employees'] contentions. The contracts having expired, the provisions for salary increments and longevity payments are no longer in effect."

It is clear that the courts have continued to maintain the findings in KATZ, supra. An employer's unilateral change in conditions of employment during negotiations, short of true impasse, is generally held to be a refusal to bargain in good faith. Maintaining the "status quo" upon the expiration of a collective bargaining agreement has been deemed proper during the period of negotiations for a successor agreement. Maintaining the "status quo", however, does not include "change". Increasing salaries by the use of increments based upon educational or experience credits surely constitutes change. The Courts have determined that

an employer's refusal to pay increments based upon an expired contract during the period of negotiations is not a refusal to bargain in good faith.

I agree with the reasoning in BOCES, supra, "The matter of increments can be negotiated and, if it is agreed that such increments can and should be paid, provision can be made for payment retroactively."

CONCLUSIONS OF LAW

The Rosebud County School District No. 14, Forsyth, Montana, did not violate Sections 39-31-401(1) or (5) MCA.

RECOMMENDED ORDER

It is hereby ordered that Unfair Labor Practice No. 37-81 be dismissed.

SPECIAL NOTE

In accordance with Board's Rule ARM 24.25.107(2), the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within 20 days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the parties.

DATED this 17 day of May, 1982.

BOARD OF PERSONNEL APPEALS

By _____
STAN GERKE
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 17 day of May, 1982: